oppressive or morally reprehensible. He declined to intervene.

I also decline to intervene in all the circumstances of this case. The claims of the plaintiffs are accordingly dismissed with costs.

Claim dismissed.

Solicitors: *Ronald Lee & Co.; Lim Sin & Thiam Beng.*

MALAYSIAN REPORTS

RE KHOO BOO GONG, DECD. KHOO TENG SEONG v. TEOH CHOOI GHIM & ORS.

[F.C. (Chang Min Tat, Salleh Abas & Abdul Hamid F.JJ.) January 16 & February 28, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 22 of 1980]

Probate and Administration — Application to revoke appointment of executor — Absence of executor from jurisdiction — Revocation of probate — No sufficient cause shown — Probate and Administration Act, 1959, s. 34.

In this case the respondent had applied for the revocation of probate granted to the executors of the estate and the removal of the appellant as executor. The main reason for the application was that the appellant was resident in Australia. The application was allowed in the High Court and the appellant appealed.

Held: (1) absence from jurisdiction of an executor who is always available and who has done what needed to be done, albeit with some lapses, through capable and suitable solicitors, cannot amount to a cause, much less, a sufficient cause for revoking the grant to him;

(2) the respondents have not made a case for the revocation of the probate granted to the appellant and the appeal must therefore be allowed.

Cases referred to:-

(1) *In the goods of William Loveday* [1900] P. 154.
(2) *In the Estate of O. RM. M.S.M. Sevugan Chettiar decd.* [1949] M.L.J. 254.
(3) *In the Estate of Cope* [1954] 1 All E.R. 698.
(4) *Hill* v. *Bird* 82 E.R. 563.
(5) *In re Covell* (1889) 15 P.D. 8.
(6) *In re Bradshaw* (1887) 13 P.D. 18.

FEDERAL COURT.

Mrs. De Silva for the appellants.

Miss C.H. Liew for the respondents Nos. 1 and 4.

Varghese George for respondents Nos. 2 and 3.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This is an appeal by an executor whose appointment has now been revoked by the High Court at the instance of his co-executor and three other beneficiaries. The appellant is the son of the co-executor, in fact, her eldest son, but appears to have fallen out of favour with her and to have antagonised his other brothers and sisters, or most of them. It is all very unfortunate.

By his will made on December 31, 1974, the testator, Khoo Boo Gong, appointed his wife, Madam Teoh Chooi Ghim, and their eldest son, the appellant, executors and trustees of his estate. He gave no power of appointment. Being apparently aware that the appellant was even then contemplating settling in Australia, he directed in his will that if the appellant should reside outside Malaysia at the time of his death, he, the appellant, should grant a power of attorney in respect of his duties as executor to anyone of his brothers, sisters or half-sisters residing in Malaysia except one of them who was expressly named. The testator died on June 12, 1975, leaving him surviving a wife, a concubine and in all 17 children, including the appellant.

After certain specific gifts, he devised and bequeathed all the residue of his estate to his named trustees and executors, upon trust to call in, sell and convert the same into money, without accountability for postponing such calling in, sale or conversion, upon trust to divide the net balance and pay to his wife, concubine and children in the shares stated in his will. He did however emphasise that the division and distribution were to be carried out without undue delay and to be as soon as possible. The estate was to be divided into 100 shares, the wife was to get 10 shares, the concubine 5, each son 5 and each daughter 4 shares, but the appellant was to get 15 shares.

Probate was granted to the wife and the appellant on May 31, 1976. The gross value of the estate appears to be in excess of $9 millions.

At the time of the testator's death, the appellant was resident in Australia. He returned to Malaysia in March 1976, proved the will and obtained probate. After making certain arrangements for the administration of the estate, he returned to his home in Australia. What he did not then do was to appoint one of his brothers or sisters or even half-sisters to be his attorney as executor in accordance with the terms of the will. Instead, he appointed an advocate and solicitor as a trustee, apparently to comply with section 40 of the Trustee Act 1949, since he was about to absent himself from Malaysia for a period exceeding 14 days. It is now said on his behalf that this appointment was not of an attorney for executorial duties under the will but the terms of the appointment disprove this contention. However, the appellant subsequently complied with the direction of the will and appointed one of his half-sisters as his attorney, one Khoo Cheng Kim, but only after an application had to be made to the court to compel him to do so. The appointment of Khoo Cheng Kim was much to the annoyance and chagrin of his mother, as she herself frankly admitted. There was not much love lost between her and the children of her husband's concubine. Be that as it may, the appellant had, in this one respect, at least, complied with one of the terms of the will.

We think it should be stated at this juncture what is so obvious but which is so apparently lost sight of; while the responsibility of getting in and administering the estate in accordance with the wishes and directions of the testator is that of the executors and trustees who had proved the will and accepted the trusts of the will by receiving probate, instead of undertaking the work themselves, they have the alternative of entrusting the work to solicitors. In point of fact, the appellant with the then concurrence of his mother had done so, the appointment of solicitors for the estate going to M/s. Shearn, Delamore & Co., a well-known and highly experienced firm of estate solicitors.

The power to revoke a grant of probate or letters of administration is vested in the High Court by section 34 of the Probate & Administration Act, 1959 (Rev. 1972) and can be exercised for "any sufficient cause." However, there is no definition of what is sufficient cause. But, if in the words of Jeune, President, in *In the Goods of William Loveday,*[1] "the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto," then the test of what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries. In our view, that is a strictly objective test.

A reference to the court files reveals that the assets of the estate consist of lands and moveables in the form of shares in listed (public) and private companies. The estate also has a beneficial interest in the estate of the testator's father, Khoo Chew Pan. One would not have thought that great difficulties lay in the way of administering the estate. There might well be some difficulty in agreeing to the valuation of some of the assets, particularly of the shares in the private companies. There also seemed to be some complaint about the difficulty of obtaining information from the surviving trustee of the estate of Khoo Chew Pan as to the value of the testator's share therein, though how justified these complaints are remains to be seen. There seems to be two sides to the story. Nevertheless the respondents believe they have sufficient cause to come to court for the revocation of the grant of probate to the appellant.

Fortunately, for this court at least, the 1st respondent has set down compendiously in her affidavit the facts of this case as they appear to her and it seems to us that a critical examination of these allegations and admissions in the light of what her co-respondents say, does enable us to determine whether they have a sufficient cause or causes for their application. First, what she says the appellant has done. That occurs in paragraph 4 of her affidavit, which deserves to be set out in full:

> "4. During the respondent's visit to Kuala Lumpur from March, 1976 to October 31, 1976, he had carefully and skilfully planned the administration of the Estate ahead of his departure, in such a manner, so as to enable him to execute his executorial duties from Australia. To ensure his office as executor and that he may operate in absentia, he did, *inter alia,* the following:—
>
> (i) Took inventory of the assets of the Estate;
>
> (ii) Took inventory of the assets of the estate of Khoo Chew Pan in which the testator has a beneficial interest. Both records of items 2 and 3 and some original documents, are in the respondent's possession in Australia;
>
> (iii) Prepared and applied for Probate;
>
> (iv) Obtained Certificate of Postponement from the Collector of Estate Duty;
>
> (v) Made deposit towards estate duty in the sum of $1,157,090 from the Estate's liquid asset of $2,831,442;
>
> (vi) Ensured distribution of Ringgit Eight hundred thousand ($800,000) of the Estate's liquid funds. In fact the Estate effected distribution thrice and they are:
>
> (a) Malaysian asset $400,000 in June 1976;
>
> (b) Singapore asset $400,000 in June 1977;
>
> (c) Australian asset, Broken Hill Proprietary shares $136,065;
>
> The respondent carried home to Australia some $200,000;
>
> (vii) Made me sign a standing instruction to Peat Marwick Mitchell to prepare and submit income tax returns of the Estate. A copy of the said letter dated October 4, 1976 is annexed hereto and marked 'TCG-2'.
>
> (viii) Two days before his departure from Kuala Lumpur, on October 29, 1976 he appointed Ng Seng Kiok, a member solicitor of Ms. Chooi & Co. the respondent's solicitors, as his Power of Attorney, contrary and consciously made against the intention and wishes of the testator. This appointment was never made known to

me until I brought the suit against the respondent in Originating Summons 502/1978, when the said Ng disclosed it on November 1, 1978 in his affidavit. A copy of Ng's affidavit and his Power of Attorney are annexed hereto and marked as 'TCG-3' and 'TCG-4' respectively.

(ix) Made me sign a cheque to Ms. Shearn Delamore the estate solicitors for $200,000 for the said solicitors to manage the estate;

(x) The respondent caused my agreement, to give full authority to Ms. Shearn Delamore to take over the administration of the estate, thereby treating me practically a dormant co-executor;

(xi) Deliberately manoeuvred the estate affidavit by omitting the testator's beneficial interest in the estate of Khoo Chew Pan for strategic purposes. The respondent has full knowledge of the exact assets in Khoo Chew Pan's estate but todate had not submitted his part of the corrective estate affidavit.

Acting in good faith, in the interest of the estate, and trusting fair play from the respondent, I acted according to his guidance, even though the respondent and I never did see eye to eye. In view of my old age and my ignorance in these matters I have always given in to the respondent."

If the appellant had taken an inventory of the assets not only of the estate of the testator but also of the estate of Khoo Chew Pan, he was then in a position to call in the estate and take the further necessary proceedings. He had paid off part of the estate duty payable and he had made three interim distributions from the remaining or part of the remaining cash assets to the beneficiaries. There is no complaint of the fairness of the distributions. He had instructed solicitors other than his personal solicitors to complete the administration of the estate. What he did not then do was to include in his first estate duty affidavit the testator's beneficial share in the estate of Khoo Chew Pan. That could be a matter of a subsequent corrective estate duty affidavit and the question of responsibility for the penalty for this failure that will almost certainly arise, will as certainly be determined against the appellant, if indeed it was his fault that the omission was made. But, this apart, we cannot, for ourselves, think of anything more that the appellant could have done, except perhaps the filing of the corrective estate duty affidavit. His appointment of M/s. Shearn, Delamore & Co. as the solicitors of the estate, when they were and are not his personal solicitors, seems to us to be a particularly felicitous move, since they are at all times the solicitors for the estate of Khoo Chew Pan.

Now, what are the exact complaints of the 1st respondent against the appellant. It will be difficult to quote at large from her somewhat loose and rambling affidavit but very clearly, the main contention of the mother and the other respondents is that the appellant should be resident within jurisdiction, if not in Kuala Lumpur. In paragraph 12 of her affidavit, the mother solemnly affirmed that

"12. Unless (the appellant) is willing to return to Kuala Lumpur to wind up the Estate, I have no choice but to seek remedy from the court to revoke the Probate for the sake of the Estate and those beneficially interested. I am convinced (and (it is) confirmed by Khoo Cheng Kim) that the (appellant) will not ever return to Malaysia."

Khoo Teng Bin, the 3rd respondent and one of the parties in the application to revoke the probate to the appellant, in the penultimate paragraph of his affidavit, the numbering of the paragraphs of his affidavit strangely stopping after the fifth, said that "unless the (appellant) is willing to come back to Kuala Lumpur and devote all energy wholeheartedly towards finalisation of the estate or (*sic*) unless his power of attorney Khoo Cheng Kim can act independently of remote control by the appellant I am convinced that the court must be approached to revoke the probate." Khoo Teng Lip, the 2nd respondent, who was also permanent resident in Australia, was prepared, as he affirmed, to leave his job and his residence in Australia and return to Kuala Lumpur to co-administer the estate.

In *In the Estate of O.RM.M.S.M. Sevugan Chettiar, dec'd.*,[2] Willan C.J. while referring to the general practice not to do so, held that the fact that both the executors were out of the jurisdiction did not disentitle them to probate. He was of the opinion that there was nothing in the then Probate & Administration Enactment which deprived an executor out of jurisdiction of the right to have probate granted to him, unless the court acted under the provisions of section 54 of the Enactment (now, with certain modifications, section 16 of the Probate & Administration Act, 1959) and that section 41 of the Enactment (substantially section 29(a) of the Act) was merely an enabling provision which did not provide that where an executor was absent from the country, administration of the deceased's estate could be granted only to an attorney of the absent executor.

The absence of the appellant from Malaysia is therefore, by itself, not necessarily a sufficient ground for revoking probate. In any event, the contention of the mother and the other respondents completely ignores the specific provisions in the will enabling the grant to the appellant despite his absence from jurisdiction, so long as he appointed an attorney from among his brothers, sister's or half-sisters and that he has now done, however he might have to be compelled to do it.

The other complaint is delay in settling the payment of estate duty and the resultant incurring the interest at $287.12 per day. The obvious solution to this second complaint is the application to court to sell some of the immovable assets or some of the movable assets to pay the estate duty remaining unpaid, but just as obviously, no one really got down to making this application or taking this step and everyone became enmeshed in the not uncommon struggle between executors and between executors and beneficiaries. According to the appellant in his affidavit, from the moment he returned to Australia, he lost the ear of his mother and he could not obtain her co-operation. And, it is just as clear that from the moment she appointed solicitors of her own, every action of the appellant or of the solicitors for the estate was scrutinised under a magnifying glass and with suspicion. The correspondence of her solicitors speaks for itself. The letters were of such particularity and couched in a tone so verging on acrimony that to M/s. Shearn, Delamore & Co. they were "unnecessarily aggressive", "attacking each and every step that we made and apart from anything else, the answers to which required in our going through old grounds and research into past records." The breaking point was reached on September 5, 1979. On

that day, M/s. Shearn, Delamore & Co. felt they could not take anymore of this and, in no uncertain tone, resigned.

From that moment, administration of the estate came to a complete standstill. Attention was focused on removing the appellant as executor. On September 21, 1979, M/s. Zain & Co., another firm of solicitors, filed the motion in question for the revocation of the grant to the appellant on behalf of the 2nd and 3rd respondents, the application being supported by affidavits affirmed by the 1st and 4th respondents and filed by M/s. C.H. Liew & Co. on their behalf and by two other affidavits affirmed by the 2nd and 3rd respondents and filed by M/s. Zain & Co. on their behalf.

In substance, the application was for the appointment of the four respondents in place of the appellant and the 1st respondent, in the alternative, for the appointment of the 2nd, 3rd and 4th respondent together with another named beneficiary. The application was necessarily *inter partes,* but the only respondent named originally was the appellant himself. It was also for service out of jurisdiction, since the address of the respondent in Australia was given, but there did not appear to have been any application for leave to effect such service out of jurisdiction. No objection was however taken and the appellant filed a counter-affidavit. By an amendment, the application was declared to be for service on all the other beneficiaries of the estate, but up to the time of hearing, not all had been served. A majority had been served; none of them appeared to oppose the motion; the solicitors failed to persevere with their intention to serve the other beneficiaries, apparently on the assumption and in the belief, they now had a decisive and telling majority of the votes and they no longer needed to serve them. Furthermore, the reliefs sought were improper; what the respondents should have asked for following the revocation of the grant to the executor was administration with the will annexed. They conceded this before us, but did not do so in the High Court, and then only when objection was taken to the order they had obtained from the court.

We propose however to pass over the failure to serve some of the beneficiaries and deal with the appeal in substance in the way it was argued before us.

The respondents succeeded in the High Court and obtained the order for the grant of probate to them, because the learned judge thought that the appellant had failed to reply to and refute the accusations made against him.

With respect, the learned judge did not appear to have read the appellant's affidavit in any great detail and to draw the various inferences to be drawn from it and the other affidavits and the documents and to regard the application in the totality of the evidence. But it also must be said, as would appear so clearly from the notes taken by him, that the proper law had not been drawn to his attention.

From the evidence, it is clear and beyond argument that the 1st respondent was, without disrespect to her, unfit for the task set before her. She admits as much in her affidavit. She depends on advice. That by itself is not a bad thing, but for the reasons given by her and this is the source of the litigation, she no longer accepts the advice of her eldest son, the appellant, unless he is willing to return to Kuala Lumpur. She herself would rather return the grant to her. But not one of the reasons advanced by her, on the authority of decided cases, was sufficient ground for the revocation. Mr. Verghese for the 2nd and 3rd respondents, with whom Miss C.H. Liew for the 1st and 4th respondents entirely agrees, suggests that collectively they do.

Insofar as the estate of Khoo Chew Pan is concerned, apart from the initial failure to disclose, the appellant had subsequently instructed the estate's then solicitors to do so and to use the information given by them as solicitors of the estate of Khoo Chew Pan. But the new solicitors for the 1st respondent required checks on the accuracy of the facts and figures given and on their advice, the 1st respondent refused and still refuses to swear the corrective estate duty affidavit. As for the omission, an allegation that the administrators had sworn a false Inland Revenue affidavit, *In the Estate of Cope,*[3] or a failure to bring in a full inventory, see *Hill* v. *Bird,*[4] is not a sufficient ground to revoke the grant. The beneficiaries have other recourses to court for any penalty or loss the estate and consequently they suffered from such neglect, deliberate or otherwise, of a defaulting executor, other than an application to revoke his grant.

As for the estate of the testator, we have made the observation that the administration of the estate stagnated after the resignation of the first solicitors and the consequent application for the removal of the appellant, filed in court in September 1979, engaged the attention of the parties to the exclusion of all other considerations. Before then, it was the obstructionism of the respondents' solicitors that had impeded the administration.

We have also stated as our considered opinion that the most felicitous appointment of solicitors for the estate of the testator was of M/s. Shearn, Delamore & Co., but with their adamant resignation, the question arises as to the appointment of new solicitors for the estate. In answer to our query, the information was volunteered that an independent firm of solicitors had been appointed, but the answer was obviously too vague and we pressed for a more informative answer. Then and only then were we told that the solicitors appointed were the same solicitors for the 1st respondent, who clearly were far from independent, in the sense that word had been used. This appointment has to be considered in the light of the 1st respondent's admission of incapability to discharge her functions as executrix. Further, if M/s. C.H. Liew & Co. as the new solicitors continue to be as particular as before or are paid in their own coin, we cannot see any prospect of progress in the administration of the estate.

But behind the smokescreen that had been thrown up, it can be clearly discerned that it is the insistence of the 1st respondent that the appellant should return to Kuala Lumpur that is the main-spring for her

action. She said so in the concluding paragraph of her affidavit. It is also echoed by the other respondents. Absence from jurisdiction of an executor who cannot afterwards be found may be a sufficient reason for revoking the grant: *In re Covell*[5] and *In re Bradshaw.*[6] But this is not such a case. His exact whereabouts are always known. Absence from jurisdiction of an executor who is always available and who has hitherto always done what needed to be done, albeit with some lapses, through solicitors who not only were capable but in the circumstances were the most suitable, cannot in our view amount to a cause, much less a sufficient cause for revoking the grant to him.

We have ventured a suggestion that in the present state of division amounting almost to hostility, the wisest course seems to be for all parties to agree to the appointment of the Official Administrator to administer the estate. The Official Administrator will obviously have to be accorded more confidence than the previous solicitors had received. The appellant was contacted by trunk call to Australia. He agreed. But the respondents consistently refused. We are unable to persuade ourselves that we have the discretion to over-ride the express wishes of the testator in the absence of any compelling reason to revoke the grant of probate to the grantee and to force the appointment of the Official Administrator on the parties.

In our view, therefore and with respect, we do not think that the respondents have made out a case for the revocation of the probate granted to the appellant. No sufficient cause has been shown by the respondents. The appeal must be allowed. The appellant shall have his costs of the appeal from the estate. The parties shall retain the costs awarded them by the High Court but the respondents shall bear the costs of the appeal personally.

Appeal allowed.

Solicitors: *Chooi & Co.; C.H. Liew & Co.; Zain & Co.*

DATUK HARUN BIN HAJI IDRIS v. OFFICER-IN-CHARGE, PUDU PRISON

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) January 21 & March 5, 1981]

[Kuala Lumpur — Federal Court Criminal Appeal No. 42 of 1980]

Administrative Law — Habeas corpus — Sentences of High Court — Confirmed and varied by Federal Court — Whether sentences concurrent or consecutive — Power of superior court to amend and rectify its order and warrant — Habeas corpus not available where applicant is serving sentence imposed by a superior court — Habeas corpus cannot be used to review decision of superior court — Warrant of commitment — Criminal Procedure Code (F.M.S. Cap. 6), ss. 278 & 292.

Criminal Law and Procedure — Accused sentenced in respect of two cases — Whether sentences concurrent or consecutive — Power of court to alter or review judgment — Warrant of Commitment — Criminal Procedure Code (F.M.S. Cap. 6), ss. 278 & 292.

This was an appeal from the decision of the High Court reported in [1981] 1 M.L.J. 47.

The appellant had been convicted on three charges under the Prevention of Corruption Act, 1961 and sentenced to one year imprisonment on the first charge and two years' imprisonment on the second and third charges, the sentences to run concurrently. These sentences were confirmed on appeal. Subsequently the appellant was convicted on two charges under the Penal Code and was sentenced to six months' imprisonment on the first charge and fined $15,000 on the second charge. On appeal the Federal Court enhanced the prison sentence on the first charge to four years and imposed a sentence of three years on the second charge, the sentences to run concurrently. After applications to appeal to the Yang di-Pertuan Agong had been refused, the appellant commenced his prison sentence on March 1, 1978. At that time a warrant of commitment was issued in respect of the second case which was silent on whether the sentences passed on the appellant was concurrent or consecutive to the sentences in the earlier case. Subsequently on August 29, 1979, a second Warrant of commitment was issued and backdated to February 28, 1978 with the addition of the words "but these sentences to commence on the expiration of the sentence imposed" in the first case. The appellant applied for an order of *habeas corpus* claiming that he had been illegally confined in prison from October 29, 1980, as he had already completed serving his sentence as on that date, assuming the sentences in the two cases were concurrent.

Hashim Yeop A. Sani J. dismissed the application and the appellant appealed.

Held: (1) the learned Judge was right to say in effect that this was not a case where he could grant a writ of *habeas corpus* or make a declaration. As the appellant was a convicted person serving a sentence imposed by a superior court of competent jurisdiction *habeas corpus* was not available to the appellant. Moreover *habeas corpus* cannot be used as a means of reviewing the decision of a superior court;

(2) the learned judge was perfectly correct to state that a superior court as a court of record has a inherent jurisdiction to remedy mistakes in its record e.g. accidental omission. The inherent power is an extraordinary power which ought to be exercised fairly, cautiously and rarely and only when the court considers that the ends of justice require it;

(3) the amended order or warrant in this case should not be construed as a review or alteration of the earlier order as the question of sentence remained the same. The question of functus officio did not arise in carrying out an administrative function which need not be performed in court e.g. drawing up a warrant of committal;

(4) the alteration made in the subsequent order and warrant was a rectification made solely to conform with the decision of the court made in the proper exercise of its discretion. As a court of last resort the Federal Court was perfectly competent to amend its order and warrant to reflect its real decision. That was effected by the Deputy Registrar who was merely performing an administrative function in the judicial process.

Cases and authorities referred to:-

(1) *Datuk Harun bin Haji Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 155.

(2) *Datuk Harun bin Haji Idris v. Public Prosecutor* [1978] 1 M.L.J. 240.

(3) *Carus Wilson's Case* (1845) 7 Q.B. 984; 115 E.R. 759.

(4) *Gurdit Singh's Case* [1933] M.L.J. 224.

(5) *Re Francis Robert Newton* 16 C.B. 97; 139 E.R. 692.

(6) *Re Dunn* (1847) 5 C.B. 215; 136 E.R. 859.

(7) *Registrar's Circular No. 7 of 1961,* [1962] M.L.J. viii.

(8) *Goh Ah San & Ors.* v. *The King* [1938] M.L.J. 95.

(9) *R.* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256.

(10) *Public Prosecutor* v. *Heng You Nang* [1949] M.L.J. 285.

(11) *Queen Empress* v. *Durga Charan* (1885) I.L.R. 7 All 672.

(12) *Queen Empress* v. *C.P. Fox* (1885) I.L.R. 10 Bom. 176.

(13) *State of Bombay* v. *Geoffrey Manners & Company* A.I.R. 1951 Bom. 49.

(14) *A.S. Naidu* v. *State of Madhya Pradesh* [1975] Cr. L.J. 498.